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June 15, 2016

VIA ELECTRONIC SUBMISSION

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW.
Washington, DC 20581

Re: Notice of Proposed Amendment to and Request for Comment on the Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations To Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act

Dear Mr. Kirkpatrick:

Texas Industrial Energy Consumers (TIEC) appreciates this opportunity to comment on the Commodity Futures Trading Commission's (CFTC's) Proposed Amendment to Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations To Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act (CEA) Pursuant to the Authority Provided in the Act (the "Proposed Amendment").

TIEC members include companies involved in a broad range of industrial and manufacturing operations, including high-tech manufacturing, chemical manufacturing, refining, pulp and paper operations, natural gas liquefaction, oil and gas production, and a host of other energy-intensive activities. TIEC's members are located in regions of Texas that are a part of the Electric Reliability Council of Texas (ERCOT), the Midcontinent Independent System Operator (MISO), and the Southwest Power Pool (SPP).

TIEC has serious concerns about the potential consequences of the Proposed Amendment. Specifically, TIEC is concerned that the Proposed Amendment would facilitate litigation that interferes with and potentially undermines the comprehensive regulatory scheme in the Federal Power Act (FPA) and the Texas Public Utility Regulatory Act (PURA) as

administered by the Federal Energy Regulatory Commission (FERC) and the Public Utility Commission of Texas (PUCT), respectively. This interference would conflict with FERC and the PUCT's authority to develop appropriate competitive market designs, which will ultimately harm end-use consumers. Accordingly, TIEC urges the CFTC to reject the Proposed Amendment.

1) Construing the CEA to allow private rights of action for transactions in ERCOT and other markets would interfere with the comprehensive regulatory scheme provided by the FPA, PURA, and the rules implementing these acts.

The PUCT administers a comprehensive regulatory structure under PURA to maintain resource adequacy in the portion of the State of Texas where ERCOT operates. FERC administers a similar structure with the same objective in regions of Texas that are part of MISO and SPP. When Congress expanded the authority of the CFTC through the Dodd-Frank Act, it explicitly preserved FERC and the PUCT's jurisdiction to implement and oversee wholesale electricity markets. The CFTC's original exemption order properly determined that PUCT jurisdiction was sufficiently comprehensive to protect the public interest.¹ Nothing has changed since that time, and allowing private rights of action would still encroach on the PUCT's exclusive jurisdiction over wholesale sales in ERCOT and directly contradict long-established precedent. FERC's authority and its comprehensive regulatory structure would be similarly compromised and subject to collateral attack through litigation, to the detriment of electricity customers and the competitive market as a whole.

It is clear that the Legislature intended to protect and preserve the PUCT and FERC's comprehensive market oversight when enacting the CEA. For example, the CFTC's jurisdiction under the CEA is subject to that statute's savings clause,² which provides that, "[n]othing in [the CEA] shall limit or affect any statutory authority of [FERC] or a State regulatory authority" with respect to certain transactions that are the subject of the Proposed Amendment.³ Also, the CEA requires the CFTC to exempt markets like ERCOT from any provision of the CEA if it finds that an exemption is in the public's interest.⁴

In adopting the original exemption order, the Commission explicitly found that FERC and PUCT jurisdiction were sufficient to protect the public interest. Specifically, the Commission found that, "(a) the Covered Transactions have been, and are, subject to a long-standing, regulatory framework for the offer and sale of the Transactions established by FERC or PUCT; and (b) the Covered Transactions administered by the RTOs, ISOs, or ERCOT are part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to FERC and PUCT regulation and oversight."

¹ See 78 Fed. Reg. 19894.

² 7 U.S.C. 2(a)(1)(A).

³ 7 U.S.C. 2(a)(1)(I)(1).

⁴ 7 U.S.C. 6(c)(6).

Interstate electricity markets are regulated by FERC. More precisely, the FPA authorizes FERC to comprehensively regulate “the transmission of electric energy” and “the sale of electric energy at wholesale in interstate commerce.”⁵ Congress’s deference to FERC on matters within FERC’s jurisdiction is underscored by the fact that its decisions are not subject to review by the Department of Energy.⁶

The Supreme Court has also recognized FERC’s exclusive jurisdiction over interstate energy markets.⁷ In *Hughes v. Talen Energy*, the Court invalidated state efforts to increase incentives for generation because they interfered with FERC’s exclusive authority to regulate the wholesale electricity market.⁸ Earlier in the term, the Court upheld FERC rules on demand response payments, finding that FERC had the exclusive authority to regulate wholesale rates and any rules that might affect such rates.⁹

The PUCT possesses similar authority over ERCOT, which is an intrastate system located entirely within the State of Texas. In particular, PURA provides that “[t]he commission shall adopt and enforce rules relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among generators and all other market participants, or may delegate to an independent organization responsibilities for establishing or enforcing such rules.”¹⁰ Moreover, PURA explicitly provides PUCT authority to decide disputes between market participants and ERCOT.¹¹

Allowing private rights of action would undermine FERC and the PUCT’s regulatory authority, and would disrupt oversight of their respective wholesale markets. FERC and the PUCT are staffed by experts who are intensively trained and responsible for managing the highly complex issues that arise in administering a reliable, competitive energy market. Under the Proposed Amendment, courts and juries would be able to second-guess those experts’ policy decisions on matters that are properly decided by regulatory and market specialists.

Electricity markets are unlike any other commodity market. Private suits of the type envisioned by the Proposed Amendment would involve extremely technical questions about the rules regulating the energy markets and how those rules should be interpreted and applied in a particular fact setting. But judging how those markets should operate has been reserved for FERC and the PUCT, and understandably so, considering the fact that even minor changes to the rules governing these markets can have a substantial impact on how they function. Additionally, the process by which FERC and PUCT promulgate such rules creates a level of certainty for market participants that influences and supports investment decisions. Allowing the courts to interfere with that certainty could be detrimental to resource adequacy. Further, the possibility

⁵ 16 U.S.C. § 824(b)(1).

⁶ 42 U.S.C. § 7172(g).

⁷ 16 U.S.C. § 824 (b)(1).

⁸ See *Hughes v. Talen Energy*, 136 S.Ct. 1288 (2016).

⁹ See *FERC v. Electric Power Supply Ass’n*, 577 U.S. ___ (Jan. 25, 2016).

¹⁰ Tex. Utilities Code § 39.151(d).

¹¹ Tex. Utilities Code § 39.151(d-1)(6).

that courts would effectively have concurrent rulemaking authority with the PUCT and FERC would have a significant chilling effect on desired market incentives, driving up the costs of participation and ultimately raising prices for consumers.

2) Allowing transactions in organized markets to give rise to private rights of action will ultimately hurt consumers

Ultimately, consumers will bear the consequences of the Proposed Amendment. Litigation, or even the threat of litigation, will result in market inefficiencies that will ultimately increase electricity rates. For example, ERCOT is a non-profit entity funded entirely by administrative fees charged to electricity consumers, so if ERCOT incurs litigation expenses or has a judgment issued against it, those costs will be funded through increased fees or a similar uplift to all electricity consumers. Allowing private suits against RTOs would force consumers to fund litigation expenses and potential judgments that would result in little or no benefit, given that FERC and the PUCT already administer comprehensive consumer protection schemes. The current level of oversight provides an appropriate channel for private entities to file complaints with FERC and the PUCT without compromising the deliberate policy decisions that go into designing and maintaining efficient wholesale electricity markets.

* * * *

TIEC respectfully requests that the CFTC reject the Proposed Amendment because it would undermine a carefully crafted regulatory scheme to the detriment of both electricity consumers and competitive electricity markets in general.

Sincerely,

/s/ Katherine L. Coleman

Katherine L. Coleman

Attorney for Texas Industrial Energy Consumers

KC/dl